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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RICHARD D. MERAZ, Plaintiff and Respondent, v. TREDWAY, LUMSDAINE & DOYLE et al., Defendants and Appellants.	B202458 (Los Angeles County Super. Ct. No. VC048643)

APPEAL from an order of the Superior Court of Los Angeles County. Raul Anthony Sahagun, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Kenneth C. Feldman for Defendants and Appellants.

Hershorin & Henry and Lori C. Hershorin for Plaintiff and Respondent.

Dale and Darlene Kreinkamp (the Kreinkamps), represented by Tredway, Lumsdaine & Doyle, and one of its attorneys, Matthew L. Kinley (collectively TLD), brought an action against Damon and Teresa St. Germain (the St. Germains) for specific performance, namely the sale of certain real property. The Kreinkamps also named plaintiff and respondent Richard D. Meraz (Meraz), the person who ultimately purchased the property from the St. Germains, as a defendant. After Meraz prevailed in the underlying action, he initiated this malicious prosecution action against TLD and the Kreinkamps. According to Meraz, the Kreinkamps and TLD never should have pursued him in the underlying action. TLD responded to the complaint by filing a special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16,[1] California's anti-SLAPP[2] statute. The trial court denied TLD's motion, finding that Meraz established a prima face case of malicious prosecution. TLD appeals.

We agree with the trial court that Meraz presented a prima facie case of malicious prosecution. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Kreinkamps try to purchase the property from the St. Germains

In 2004, the Kreinkamps sought to purchase certain real property owned by the St. Germains. Apparently, they agreed to a purchase price of $675,000, with $525,000 to be reflected in a residential purchase agreement and the remaining $150,000 to be paid outside of escrow. The Kreinkamps requested such a deal in order to transfer their tax basis on their current home to avoid an increase in their residential property tax.

On February 1, 2004, the Kreinkamps, along with their real estate broker Julie Yeomans-Moradi (Moradi), and the St. Germains met to sign the residential purchase

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

agreement. The Kreinkamps initialed and signed the residential purchase agreement. The St. Germains, on the other hand, only initialed the residential purchase agreement. Without informing the Kreinkamps or Moradi, they never signed the "ACCEPTANCE OF OFFER" provision of the agreement. Instead, they retained the original residential purchase agreement, representing to the Kreinkamps that they would take the documents to the escrow company to open an escrow account.[3]

An escrow was opened and included the not-fully-signed residential purchase agreement. Pursuant to the residential purchase agreement, escrow was to close by February 27, 2004. On March 3, 2004, the St. Germains cancelled the escrow and instead entered into an agreement to sell the property to Meraz for $640,000.

The Kreinkamps retain TLD and initiate the underlying action

Thereafter, the Kreinkamps retained TLD. On March 17, 2004, TLD, on behalf of the Kreinkamps, filed an action against the St. Germains. In the original unverified complaint, the Kreinkamps alleged that they and the St. Germains entered into a written residential purchase agreement pursuant to which the Kreinkamps would purchase the St. Germains' property for $520,000.[4] According to the complaint, the St. Germains breached the written agreement by failing to complete the sale of the property to the Kreinkamps. The complaint did not allege any oral agreement, and did not mention the $150,000 payment to be paid outside of escrow.

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[3] According to the St. Germains, they refused to proceed with the transaction and sign the residential purchase agreement because it reflected a sale price of $525,000, even though they had agreed to a sale price of $675,000. They were worried that the Kreinkamps would not pay the additional $150,000 without a written agreement requiring them to do so. Additionally, they feared that the Los Angeles Taxing Authority would discover the fraud scheme. They did not want to be a party to the fraud.

[4] There is some confusion in the papers regarding the purchase price of the property; while the various pleadings allege that the purchase price was $520,000, the residential purchase agreement reflects a purchase price of $525,000. The parties do not discuss this discrepancy. Throughout this opinion, we refer to the purchase price of $525,000.

In connection with the initiation of the lawsuit, TLD, on behalf of the Kreinkamps, recorded a lis pendens with the recorder's office against the subject property. No proof of service was filed with the recorder's office; in fact, the Kreinkamps did not serve Meraz with a copy of the lis pendens at that time.[5]

The Kreinkamps discuss title insurance with Meraz

After litigation had commenced, in early July 2004, while he was working in his garage at the subject property, Meraz noticed a car drive past his home several times. The car eventually stopped, and the Kreinkamps stepped out and introduced themselves to Meraz. The Kreinkamps then told Meraz that they had tried to purchase the property, but that their purchase had not worked out. During their discussion, the Kreinkamps asked Meraz whether he had title insurance for his purchase of the property; he replied that he did.

The Kreinkamps name Meraz as a defendant in their first amended complaint

Shortly thereafter, on July 26, 2004, TLD, on behalf of the Kreinkamps, filed a first amended complaint against the St. Germains and added Meraz as a defendant. Like the original complaint, this pleading alleged that pursuant to the written residential purchase agreement, the St. Germains agreed to sell their property to the Kreinkamps for $520,000 and that the St. Germains breached that agreement. The first amended complaint did not allege breach of any oral agreement and did not mention the $150,000 payment to be made outside of escrow. Attached to the pleading was a copy of the lis pendens.

After being served with the first amended complaint, Meraz went to the Kreinkamps' home to discuss why he had been named in the lawsuit. The Kreinkamps told him that TLD recommended naming Meraz as a defendant because they needed the title insurance company's monies for settlement purposes. The Kreinkamps then

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5 The Kreinkamps claim that they did not serve Meraz with a copy of the lis pendens on that date because they did not know about his existence as his escrow did not close until April 24, 2004.

instructed Meraz to take the first amended complaint to his title insurance company, who "would take care of it."

Meraz's attorney also asked TLD to dismiss Meraz from the lawsuit on the grounds that he was a bona fide purchaser. TLD refused.

The operative third amended verified complaint

TLD later filed a second amended complaint, which again averred breach of a written agreement only. Meraz's attorney again contacted TLD and asked that Meraz be dismissed. TLD refused, prompting Meraz to file a demurrer to the third (declaratory relief), fifth (constructive trust), sixth (negligence), and seventh (unjust enrichment) causes of action. His demurrer was sustained without leave to amend, leaving only the quiet title cause of action against him.

The Kreinkamps, through TLD, then filed the third amended verified complaint. According to the verified third amended complaint, the St. Germains agreed to sell their property to the Kreinkamps pursuant to a written agreement only and for $520,000. As against Meraz, the Kreinkamps alleged that he "had actual notice and/or inquiry and/or constructive notice" of the Kreinkamps' claim and therefore was not a bona fide purchaser of the property.

Discovery

Thereafter, the parties participated in discovery. Specifically, Meraz was deposed on February 2, 2005. He testified that he knew nothing about the Kreinkamps' claims or the lawsuit at the time his escrow closed on the property.

Later, Darlene Kreinkamp testified that there never was an executed agreement between the Kreinkamps and the St. Germains for the sale of the property.

Following these depositions, on March 15, 2005, Meraz's attorney contacted TLD and again requested that Meraz be dismissed. TLD did not respond to the letter.

Meraz's attorney sent another letter to TLD on April 21, 2005, asking that Meraz be dismissed from the lawsuit. Again, TLD did not respond.

Meraz's motion to expunge the lis pendens

On May 5, 2006, Meraz filed a motion to expunge the lis pendens. He offered several arguments: (1) The lis pendens was invalid because it had not been served on him prior to its recordation, and had not been filed with the court immediately after it was recorded, as required by section 405.22. (2) The lis pendens should be expunged because the residential purchase agreement between the Kreinkamps and the St. Germains was unenforceable under the statute of frauds as it had never been executed by the St. Germains. (3) The payment of $150,000 had not been documented and there was never a meeting of the minds as to how to structure the payment of the additional $150,000. (4) The agreement between the Kreinkamps and the St. Germains constituted an unenforceable, illegal contract since the $150,000 payment outside of escrow was designed for the Kreinkamps to avoid property taxes. (5) Meraz was first served with the lis pendens when the first amended complaint was left on his car by a process server.

On July 19, 2006, the trial court granted Meraz's motion to expunge the lis pendens. The trial court found "that the purported purchase agreement is incomplete as confirmed by the recent testimony of . . . Moradi and therefore cannot be the basis for specific performance of the sale of this real property. According to the deposition testimony of . . . Moradi, the purchase agreement is unsigned by the St. Germain[]s, and does not include the payment outside of escrow. Furthermore, the escrow that was opened in anticipation of a signed agreement would have also expired without extension on February 27, 2004. The escrow was canceled on March 3, 2004."

Following the trial court's ruling, Meraz's attorney sent at least two additional letters to TLD asking that Meraz be dismissed from the lawsuit.

Meraz's motion for summary judgment

On August 4, 2006, Meraz filed a motion for summary judgment. Again, he offered several bases for awarding him judgment: (1) The residential purchase agreement between the Kreinkamps and the St. Germains was unenforceable under the statute of frauds. (2) The Kreinkamps and the St. Germains never had a meeting of the minds as to how the $150,000 payment was to be documented or paid. (3) Meraz was a bona fide

purchaser for value because he had no actual knowledge of the Kreinkamps' claims or the lis pendens until after his escrow closed on April 24, 2004, and because the lis pendens did not adhere to the procedural requirements of section 405.22. (4) A cause of action to quiet title could not be maintained by the holder of equitable title (the Kreinkamps) against one holding legal title (Meraz).

The Kreinkamps opposed Meraz's motion.

After entertaining oral argument, on October 18, 2006, the trial court granted Meraz's motion for summary judgment. In so ruling, the trial court "found that there was no evidence of a fully executed written agreement to purchase/sell the property for $675,000. The only written document purports to transfer the property for $525,000. There was no evidence that it was ever signed by the ST. GERMAINS. No evidence was submitted to show that anyone can testify to seeing it being signed. The [trial court] determined that the original document was produced by MORADI at her deposition and although initialed throughout, the acceptance portion of the agreement remains unsigned. . . . Despite their belief that the purchase agreement was fully executed, [the Kreinkamps] cannot produce a fully executed copy or any evidence that the acceptance of their offer to [buy] was ever delivered to them.

"The [trial court] further found that the correspondence from [Damon St. Germain] does not constitute a meeting of the minds. Instead, the [trial court] found at best, the letters represent continuing negotiations regarding the proposed payment structure. [The Kreinkamps] failed to document the $150,000 portion of the purchase price as promised by the Kreinkamps. The escrow, such as it was, did not close by February 27, 2004[,] and no extension was agreed upon.

"The [trial court] additionally found that there is no evidence that MERAZ . . . received actual notice of the lis pendens nor is there any evidence that the ST. GERMAINS were served with timely notice. There is no evidence that the KREINKAMPS served MERAZ with the lis pendens when they learned he had an adverse interest in the property. The [trial court] further found that the Kreinkamps failed to file a copy with the proof of service with the Court and they failed to file a proof of

service with the County recorder's office. They failed to fully comply with the requirements of the code[.]

"The Court also determined that the [Kreinkamps] have no basis for title of the property. Under California law, [the Kreinkamps] cannot [quiet] title as against a legal title holder. [Citation.] Thus, not only did [the Kreinkamps] fail to fully comply with the requirements for imparting constructive notice to MERAZ, the KREINKAMPS have no legal title and as discussed above, even their claim for equitable title fails. Accordingly, the [trial court] granted MERAZ's summary judgment motion."

Although TLD filed a notice of appeal on behalf of the Kreinkamps, that appeal was subsequently abandoned.

The instant malicious prosecution action

On April 27, 2007, Meraz filed the instant malicious prosecution action against the Kreinkamps and TLD.[6] In his complaint, Meraz alleges that TLD "acted maliciously in bringing and maintaining the action against [him] because they knew even before they named MERAZ that he had no constructive or actual knowledge about the KREINKAMPS' purported agreement with the ST. GERMAINS, [TLD] knew at all times that there was no signed purchase agreement, continued to pursue this action when none of the evidence supported the facts of their causes of action against MERAZ, continued with the case after the Motion to Expunge was granted and the Court stated in the Order that they had no case against MERAZ and even continued with the case against MERAZ after the motion for summary judgment was granted in [MERAZ's] favor. [TLD] relentlessly tried to extort money out of the title company and/or MERAZ by maliciously continuing with the lawsuit against him into the Court of Appeal."

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6 The St. Germains filed a separate malicious prosecution action against TLD and the Kreinkamps. TLD filed an anti-SLAPP motion in response to the St. Germains' complaint. The trial court denied TLD's anti-SLAPP motion in that case as well, and TLD appealed. On February 11, 2009, we affirmed the trial court's order denying TLD's anti-SLAPP motion.

TLD's anti-SLAPP motion

In response to the complaint, on July 19, 2007, TLD filed its anti-SLAPP motion. According to TLD, there was probable cause to pursue the underlying action. Specifically, even though the residential purchase agreement had not been fully signed by the St. Germains, the statute of frauds had not been violated. After all, the residential purchase agreement contained all essential terms, the additional term of the $150,000 payment could have been added to the contract by reviewing extrinsic evidence (namely written correspondence and oral testimony), and the parties intended to execute the residential purchase agreement.

Moreover, Meraz was not a bona fide purchaser as the lis pendens had been filed a month before he closed escrow. The fact that he was not properly served with the lis pendens does not change his actual or constructive notice of the Kreinkamps' claim.

Finally, TLD argued that Meraz could not establish malice.

Meraz's opposition to TLD's anti-SLAPP motion

Meraz opposed TLD's motion. He argued that no reasonable attorney would file a real property claim against a legal title holder without evidence of a valid claim on the subject property. TLD knew or should have known that the Kreinkamps did not have a valid real property claim without a signed written purchase agreement. Moreover, there was no evidence that Meraz had notice of the Kreinkamps' claim when they filed the lawsuit against him and attempted to quiet title. Thus, he was a bona fide purchaser for value and he should have been dismissed from the underlying action.

At a minimum, even if TLD had probable cause to file the action against Meraz, TLD should not have continued to litigate the case against him after it learned that (1) there was no signed purchase agreement, and (2) Meraz did not know about the Kreinkamps' claim to the property.

As for malice, Meraz argued that (1) malice could be inferred from TLD's pursuit of an action that lacked probable cause, and (2) TLD sought to harass Meraz to extort monies from his insurance carrier.

Trial court's order denying TLD's anti-SLAPP motion

On August 9, 2007, the trial court denied TLD's anti-SLAPP motion. After finding that this malicious prosecution action falls within the ambit of the anti-SLAPP statute, the trial court considered whether Meraz "made a prima facie showing of facts which would support a judgment in his favor." The trial court concluded that he did. As for the probable cause element, the trial court noted: "While it might have been objectively reasonable for [TLD] to name Meraz in the underlying suit, [its] continuing to prosecute the action was without probable cause." Second, the trial court found that Meraz had prevailed in the underlying action as he was awarded summary judgment. Finally, the trial court inferred malice "from the evidence that, despite unfavorable rulings and numerous requests by counsel to dismiss the action, the Kreinkamps continued to pursue their action. . . . Additionally, the Meraz declaration at least suggests that the Kreinkamps were motivated to pursue the action against him because he held title insurance on the property."

TLD's timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review. [Citation.]" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

II. *The Anti-SLAPP Statute*

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The statute "posits . . . a two-step process for determining whether an action is a SLAPP." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the defendant bringing the special motion to strike must make a prima facie showing that the anti-SLAPP statute

applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at p. 819.) Once a moving defendant has met its burden, the motion will be granted (and the claims stricken) unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567–568.)

In order to establish a probability of prevailing, a plaintiff must *substantiate* each element of the alleged cause of action through competent, admissible evidence. (*DuPont Merck Pharmaceutical Co. v. Superior Court*, *supra*, 78 Cal.App.4th at p. 568; see also *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88–89 [reiterating that "'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited"'"].) "This requirement has been interpreted to mean that (1) when the trial court examines the plaintiff's affidavits filed in support of the plaintiff's *second step* burden, the court must consider whether the plaintiff has presented sufficient evidence to establish a prima facie case on his causes of action, and (2) when the trial court considers the defendant's opposing affidavits, the court cannot weigh them against the plaintiff's affidavits, but must only decide whether the defendant's affidavits, as a matter of law, defeat the plaintiff's supporting evidence." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184.) Only if he fails to meet this burden, was the motion properly granted. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188–1189.)

III. *The Trial Court Properly Denied TLD's Anti-SLAPP Motion*

As Meraz concedes, his malicious prosecution action is subject to the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) Thus, the burden shifted to him to show, through competent, admissible evidence, a probability of success on the merits of his claim in order to defeat TLD's anti-SLAPP motion. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496–1498.) Accordingly, Meraz was required to

establish that the underlying action (1) was commenced by TLD or at its direction,[7] (2) pursued to a termination in Meraz's favor, (3) brought without probable cause, and (4) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871–872 (*Sheldon Appel*); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965–966.)

A. Termination in Meraz's Favor

"In order to maintain an action for malicious prosecution, the plaintiff must first demonstrate that there was a favorable termination of the underlying litigation. [Citation.] This requirement is an essential element of the tort of malicious prosecution, and it is strictly enforced. [Citation.]" (*Ferreira v. Gray, Cary, Ware & Friedenrich* (2001) 87 Cal.App.4th 409, 412–413.) A favorable termination is one reflecting the merits of the underlying action and the plaintiff's innocence of the alleged misconduct. (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) "On the other hand, a resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff." (*Ibid.*) Generally, favorable termination is a legal issue for the court to decide, and we review the issue de novo. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149.)

Following his successful demurrer to the second amended complaint, the only cause of action that remained against Meraz was to quiet title. The trial court's order granting Meraz summary judgment of that cause of action was certainly on the merits. The trial court found no basis for the Kreinkamps' claim against Meraz. Specifically, the trial court determined that the Kreinkamps did not have legal or equitable title as (1) the residential purchase agreement was not fully executed, (2) the Kreinkamps and the St. Germains had no meeting of the minds, and (3) escrow did not close as set forth by the residential purchase agreement. Moreover, there was no evidence that Meraz had actual or constructive notice of the lis pendens. TLD's argument notwithstanding, these

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[7] This element is not discussed by the parties in their briefs.

findings leave no "doubt concerning whether the dismissal of the action went to the merits of the Kreinkamps' claim or was dismissed on technical procedural grounds."

B. Probable Cause

The issue of whether probable cause exists is a question of law. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 884.) The Kreinkamps' complaint against Meraz lacked probable cause only if all reasonable lawyers would agree that it totally and completely lacked merit. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.) This determination depends upon the facts known to the party at the time of the filing of the action and the reasonable inferences therefrom. (*Sheldon Appel*, *supra*, at p. 884; *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512, overruled in part on other grounds in *Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 973.)

We agree with the trial court that Meraz established that the Kreinkamps' action against him lacked probable cause. It is undisputed that the Kreinkamps never had a signed written agreement to purchase the property from the St. Germains. Absent a signed written agreement, the Kreinkamps had no claim to the property. As such, they could not pursue a claim to quiet title against Meraz. (*Bone v. Dwyer* (1928) 89 Cal.App. 535, 542.) Under these circumstances, no reasonable attorney would file a claim to quiet title against a legal title holder. (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1383.)

In an effort to avoid this result, TLD argues that the underlying action was tenable notwithstanding the absence of a signed written agreement and the statute of frauds.[8] It then attempts to explain why, arguing that (1) the St. Germains admitted the existence of an oral agreement, (2) the St. Germains' correspondence satisfied the statute of frauds, (3) the St. Germains' initials on the residential purchase agreement were adequate, and (4) principles of estoppel potentially applied.

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[8] TLD argues that it and "the Kreinkamps had no obligation to plead the existence of an oral agreement to overcome the statute of frauds [because it was Meraz's] burden to raise the statute of frauds as an affirmative defense." Given the fact that TLD only pled breach of a written agreement, and never alleged breach of an oral agreement, we cannot agree that Meraz was required to assert the statute of frauds as an affirmative defense.

There are at least two problems with these arguments. First, TLD did not pursue these theories in the underlying action. While they may have been raised during the litigation of the underlying action, they did not form the basis of TLD's claim against Meraz. Rather, in terms of seeking to quiet title against Meraz, these theories were an afterthought, clearly devised to circumvent this malicious prosecution action. In other words, as Meraz points out in his respondent's brief, TLD "wish[es] to escape liability for the theories that [it] advanced in the underlying action by arguing that [it] *could* have argued other theories that *may* have been tenable."

It cannot do so. TLD "must have had probable cause to support each theory of liability [it] pursued in [the underlying action]." (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 835.) If TLD lacked probable cause to pursue the particular theory of liability that it litigated in the underlying action, then it "may be held liable for malicious prosecution. This is true even if [TLD] had other, viable claims that [it] failed to pursue in [the underlying action]." (*Ibid*.)

In the underlying action, TLD, on behalf of the Kreinkamps, consistently sought to quiet title based upon an alleged signed, written residential purchase agreement. This was the theory asserted in the original complaint, the first amended complaint, the second amended complaint, and the verified third amended complaint. Yet, as pointed out above, there was no probable cause for this theory; the St. Germains never signed the residential purchase agreement.

TLD claims that "[a]t the time the original action was filed, [it] only had a copy of the [residential] purchase agreement and there was a question as to whether the original contract had been signed by the St. Germains." Even if that were true, and TLD had probable cause for initiating the underlying action against Meraz, once TLD learned that the St. Germains had not, in fact, signed the residential purchase agreement, it should have dismissed Meraz from the underlying action or changed its theory of the case to one

that was supported by probable cause.[9] It did not do so. Instead, it continued to pursue Meraz on the same theory of liability, forcing him to file a motion to expunge the lis pendens and a motion for summary judgment. "[A]n attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 960; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 296.)

Second, TLD's theories against Meraz are utterly inconsistent.[10] For example, on the one hand, it alleges that the Kreinkamps and the St. Germains executed a written agreement whereby the St. Germains agreed to sell their property to the Kreinkamps for $525,000. On the other hand, it now claims that the Kreinkamps and the St. Germains were parties to an oral agreement, whereby, in addition to the monies paid pursuant to the written agreement, the Kreinkamps would pay the St. Germains an additional $150,000. Which one is it? And, if TLD contends that the oral agreement is the one that controls, then why did it not allege an oral agreement as an alternate theory of liability in any one of the four pleadings in the underlying action? In other words, at the risk of sounding redundant, while TLD perhaps "could" have sought to enforce an alleged oral agreement, it never attempted to do so.

Moreover, there was no probable cause for TLD to believe that Meraz was anything but a bona fide purchaser of the property. TLD claims that Meraz had actual or

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9 Thus, even accepting TLD's representation in its reply brief that the parties did not learn until June 20, 2006, that the St. Germains did not sign the residential purchase agreement, TLD still neglects to explain why it did not dismiss Meraz or come up with a different theory at that point.

10 Needless to say, we are not suggesting that TLD could not have asserted alternate, even inconsistent, theories of liability against Meraz. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 691.) Rather, we point out this inconsistency as evidence to support the trial court's conclusion that there was no meeting of the minds between the Kreinkamps and the St. Germains regarding the sale of the property. If there was no meeting of the minds, then there was no enforceable agreement (oral or written) that would have allowed the Kreinkamps to institute and pursue an action to quiet title against Meraz.

constructive notice of the Kreinkamps' claim to the property because the lis pendens was recorded before his escrow closed. We are not convinced.

There is no evidence that Meraz actually knew of the Kreinkamps' claim to the property before his escrow closed. It is undisputed that TLD did not serve the notice of lis pendens on him when it recorded the lis pendens. In fact, Meraz did not see the notice of lis pendens until at least July 2004, when he was served with a copy of the first amended complaint. Moreover, Meraz testified at his deposition that he was unaware of the Kreinkamps' claim at any time prior to closing escrow.

TLD's theory of constructive notice also fails. "It is a common misperception . . . that a recorded document imparts constructive notice from the moment it is recorded. That is not the law. The operative event is actually the indexing of the document." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1866; see also *Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1243–1247 [a lis pendens does not impart constructive notice until it has been indexed].)

"'[B]efore the constructive notice will be conclusively presumed, the document must be "recorded as prescribed by law." [Citation.] A document not indexed as required by statute [citations] does not impart constructive notice because it has not been recorded "as prescribed by law."' [Citation.] The [*Hochstein v. Romero* (1990) 219 Cal.App.3d 447] court explained the principle, citing such authorities as Witkin and Miller and Starr: '"The policy of the law [requiring recordation and indexing] is to afford facilities for intending purchasers . . . in examining the records for the purpose of ascertaining whether there are any claims against [the land], and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments, and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If [improperly indexed], it is to be regarded as the same as if not recorded at all." [Citation.] Thus, it is not sufficient merely to record the document. "California has an 'index system of recording,' and . . . *correct indexing is essential* to proper recordation. [Citations.]" Citations.]' (Original italics.) [Citation.]" (*Lewis v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1866.)

"The reason for this rule is obvious. The courts have long recognized that constructive notice is a 'fiction' [citation], so if a recorded document is going to affect title there must be at least a way for interested parties to find it: 'The California courts have consistently reasoned that the conclusive imputation of notice of recorded documents depends upon proper indexing because *a subsequent purchaser should be charged only with notice of those documents which are locatable by a search of the proper indexes*.' (Italics added.) [Citation.]" (*Lewis v. Superior Court, supra,* 30 Cal.App.4th at p. 1867.)

While TLD urges us to focus upon the date it recorded the lis pendens, it offers no evidence whatsoever as to when the lis pendens was indexed. Absent evidence that the lis pendens was indexed before Meraz closed escrow, TLD did not defeat Meraz's evidence that he was not on constructive notice of the Kreinkamps' claim.

C. Malice

Proof of the element of malice requires a plaintiff to show that the proceeding was commenced primarily for an improper purpose and that his or her interests were the target of the defendant's improper purpose. (*Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089, 1097; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 814.) Malice may be inferred where a party knowingly brings an action without probable cause or continues to prosecute a lawsuit discovered to lack probable cause. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 970.) That being said, the absence of probable cause does not, standing alone, constitute malice. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498–499, fn. 29.) "Merely because the prior action lacked legal tenability, as measured objectively (i.e., by the standard of whether any reasonable attorney would have thought the claim tenable [see *Sheldon Appel*, *supra*, 47 Cal.3d [at] pp. 885–886]), *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence." (*Downey Venture v. LMI Ins. Co.*, *supra*, at p. 498; see also *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743.)

Here, as the trial court found, malice may be inferred from Meraz's statements in his declaration that the Kreinkamps were insistent upon leaving him in the underlying action to collect monies from the title insurance carrier. This evidence, coupled with the lack of probable cause, is sufficient to infer malice.

DISPOSITION

The order of the trial court is affirmed. Meraz is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD